its means for doing so "reasonably fit" its asserted interest.[20]

VI. COMPETING DEMANDS FOR THE SPECTRUM.

The Commenters raise several issues with respect to the importance of Section 4(g)'s explicit requirement that the Commission "shall consider...the level of competing demands for the spectrum allocated for such stations."

Even so, the NAB states that there is "nothing in the Act or the legislative history which indicates that Congress viewed this proceeding as addressing potential reallocation of broadcast spectrum." NAB Comments at 8. But this belies the plain language of the Act, which specifically asks the Commission to consider spectrum allocation. The legislative

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legislation squarely with the issue of whether the proliferating use of local broadcast stations for the continuous transmission of home shopping programming, long-form commercials, infomercials and sales presentations warranted the imposition of must-carry obligations on cable systems****For all these reasons, we have declined to further promote the over commercialization of the airwaves by making the must carry provisions of this legislation applicable to home shopping stations. H.Rep. 102-628, 102nd Cong., 2d Sess. (1992) ("House Report"), Additional Views of Messrs. Ritter, Tauzin, Slattery, Kostmayer, Oxley and Fields. Senator Breaux of the Senate expressed the same concerns in discussion of a floor amendment to restrict must carry rights of home shopping stations. See, 138 Cong. Rec. S. 570-72 (January 29, 1992)(Statement of Senator Breaux).

[20]In his statement in support of SKC's comments, Professor Smolla quite correctly characterizes Discovery Network as "stand[ing] for the proposition that the government cannot single out commercial speech for specially disadvantageous treatment when the harms that the government seeks to prevent are cause by both commercial and noncommercial speech alike." Smolla Statement at 28. But his attempt to apply that proposition to this case simply does not work. He asserts that the government's interest in not granting must carry privileges to home shopping stations was "out of a concern for the editorial discretion of cable operators," and that "because both home shopping format broadcasters and non-home shopping format broadcasters contribute to the problem, the government cannot discriminate against home shopping format broadcasters...." Id. at 31-32. Nowhere in the plain language or legislative history of the Act is there any indication that Congress enacted Section 4(g) out of any concern for giving cable operators increased editorial discretion. The explicitly asserted government interest in Section 4(g) was to limit overcommercialization of the public's airwaves. See, footnote 19, supra.

history supports this view as well:

> [A]m I correct in the view that the Commission's proceeding should consider the scarcity of broadcasting frequencies in determining whether these program formats are consistent with the public interest....

138 Cong. Rec. E2908 (October 2, 1992) (Statement of Cong. Eckart). Chairman Dingell responded in the affirmative.

By that command, Congress intended that the Commission weigh whether that part of the spectrum which is set aside exclusively for broadcasters only, see, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969), and which is being used predominantly for the broadcast of commercial matter, would be put to better use by another user. The Commission is to consider under Section 4(g), then, whether the public interest is better served by the use of such spectrum by police, fire or other emergency services, or by other commerce-producing broadcast services such as land mobile communications.

But NAB, SKC and HSN take the narrow view when they claim variously that there is no or "little competing demand" for frequencies now used by home shopping stations. HSN and SKC claim that when HSN acquired these stations in the mid-1980's, they were the "only proposed use of the frequency." HSN Comments at 36. Even assuming, arguendo, that was the case then, with the many new technologies requesting use of spectrum, it certainly is not true in 1993. For example, a large chunk of the UHF spectrum has already been reallocated to land mobile communications.

HSN, SKC and NAB also assert that because only one home shopping licensee has been subject to a competing application at renewal, "that there is little competing demand." NAB Comments at 9. See. SKC Comments at 49 n. 64; HSN Comments at 37 n. 50. This argu-

ment, again, ignores other uses for the spectrum. And it overlooks the realities of the license renewal process. There are good reasons for the dearth in competitive applications, and they extend to all license renewals, not just home shopping licenses. "TV License Renewals Since Oct. 1991," Broadcasting Magazine, April 12, 1993 at p. 62 ("674 stations requesting renewal...11 challenged by competing applicants). The "renewal expectancy" granted the vast majority of incumbent licensees, which virtually guarantees renewal, and the Commission's limitations on settlements have made successful renewal challenges virtually futile and extraordinarily costly. "Washington Watch," Broadcasting, May 6, 1991.

CONCLUSION

CSC urges the Commission not to be mislead by the small amount of community responsive programming provided by stations predominantly utilized for home shopping programming. What the Commission must decide is whether it is in the public interest to have the public's airwaves used primarily for the dissemination of commercial matter. The Commission has the authority and the duty to answer that question in the negative.

The Commission must also not be deceived into believing that it will disserve minority-owned stations and the minority communities they serve to limit this commercial matter. With a bit of help and guidance from the Commission, these stations can be converted from stations which are compelled to devote an overwhelming amount of their broadcast day to satellite delivered, non-minority commercial matter to ones that are largely devoted to serving the unmet needs of their communities.

Respectfully submitted,

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April 27, 1993

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June 9, 1992

ARLIN M. ADAMS
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Representative John D. Dingell
Chairman, House Committee on Energy
and Commerce
2125 Rayburn House Building
Washington, D.C. 20515

Re: Proposed Cable Must-Carry Provisions

Dear Mr. Chairman:

Enclosed is a constitutional analysis prepared by myself and Deena Schneider, of our office, covering the must-carry provisions of H.R. 4850, the Cable Television Consumer Protection and Competition Act, and the amendment to that bill offered by Representative Ritter to exclude from the general must-carry rules commercial television stations predominantly used for "sales presentations or program-length commercials." The House Subcommittee on Telecommunications and Finance adopted this amendment to H.R. 4850 on April 8, 1992.

During my tenure on the United States Court of Appeals, in my practice, and as a result of teaching First Amendment courses at the University of Pennsylvania Law School, I developed considerable expertise in this area. My colleague Deena Schneider's practice has for some time involved her in First Amendment issues in the communications field, particularly with respect to the cable industry.

As our analysis shows, in our judgment the general must-carry provisions of H.R. 4850 may well violate the First Amendment. The amendment to these provisions proposed by Representative Ritter and incorporated by the Subcommittee serves the salutary purpose of bringing H.R. 4850 into greater congruence with its apparent purposes and thus reduces the possibility that the bill will be declared unconstitutional. In our view, the amendment does not raise additional First Amendment issues.

Sincerely,

Arlin M. Adams

Arlin M. Adams

Enclosure

SUMMARY

The House is currently considering inclusion of "must-carry" provisions in H.R. 4850, the Cable Television Consumer Protection and Competition Act adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992. Under must-carry, cable systems would be required to carry as part of their program offerings the broadcast signals of qualified television stations within the local viewing areas of their communities. The Subcommittee has incorporated into H.R. 4850 an amendment offered by Representative Ritter that excludes from the general must-carry requirements commercial television stations that are predominantly used for "sales presentations or program-length commercials."

The must-carry provisions under consideration raise several significant constitutional questions:

1. There Is a Significant Issue Concerning Constitutionality of Any Must-Carry Provisions.

   -- Two sets of must-carry rules adopted by the FCC have already been rejected by the Courts under the First Amendment.

   -- To withstand inevitable constitutional scrutiny, any new must-carry provisions will have to be precisely drawn so as to be necessary to further the government interests that supposedly support the must-carry concept: the fostering of the local system of broadcasting, diversity of programming, and competition among programmers.

2. Provisions That Would Require Home-Shopping and Other Direct-Marketing Dominated Stations To Be Carried on the Basic Tier Would Be Unconstitutional.

-- Requiring cable systems to carry home-shopping and other direct-marketing dominated stations would not enhance localism, program diversity, or competition (the apparent government interests supporting must-carry), and would therefore violate the First Amendment.

-- Provisions granting must-carry status to home-shopping and other direct-marketing dominated stations would provide an irrational and unfair preference to one competitor in the marketplace and would encourage the conversion of television stations to home-shopping and direct-marketing formats. Because neither result forwards the supposed purposes of must-carry, these provisions would be unconstitutional.

3. The Ritter Amendment Excepting Home-Shopping and Direct-Marketing Dominated Stations from the General Must-Carry Provisions of H.R. 4850 Alleviates the First Amendment Concerns That Would Result from Granting These Stations Must-Carry Status.

-- The amendment applies to all home-shopping and direct-marketing dominated stations and allows cable operators to decide for themselves whether to carry such stations.

-- In fine-tuning H.R. 4850 to bring it into greater congruence with its apparent purposes, the amendment in fact enhances the possibility that must-carry will pass constitutional muster and will not itself be constitutionally infirm.

DISCUSSION

1. In Order To Survive Challenge Under the First

tions from cable coverage. The Court concluded that the FCC had failed to prove that this was a "real" as opposed to "merely a fanciful threat."[3] The Court held that the FCC had not adequately demonstrated "that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat."[4]

The Court then concluded that in any event, the FCC's initial must-carry rules were broader than necessary to fulfill its expressed purpose of protecting "localism."[5] The Court first noted that "the rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator."[6] The Court also pointed out that the rules protect "every broadcaster, regardless of whether or to what degree" the broadcaster in fact is threatened by the operation of a cable system.[7] As a result, the Court found the rules to constitute an impermissible "blunderbuss approach."[8]

In its Century Communications decision, the Court likewise struck down the FCC's second version of must-carry rules, because the FCC again had failed to demonstrate the necessary "substantiality of the governmental interest" and to adopt rules that were sufficiently narrow in operation to provide the requisite "congruence between means and ends."[9]

The legal standards set forth in Quincy and Century Communications will also apply to any must-carry provisions of a cable bill that ultimately is passed. In short, the constitutionality of the must-carry provisions will turn on (1) whether there is a substantial governmental interest that supports the provisions and (2) whether the provisions are narrowly drawn so that their terms are essential to further that interest.

Presumably, the governmental interest offered in support of the must-carry provisions of H.R. 4850 will be the protection of the system of local broadcasting, coupled with related concerns for public access to diverse programs and competition among programmers.[10] It remains unclear whether the Courts will determine that there is sufficient basis for these supposed interests to uphold any must-carry provisions in a cable bill. What is clear, however, is that the provisions of H.R. 4850 without the Ritter Amendment would not be upheld because they would not forward the supposed governmental interests that support must-carry and because they would be overly broad in providing unnecessary must-carry status favoring one communications company over non-broadcast competitors providing the same type of programming.

2. Provisions That Would Require Cable Systems To Carry Home-Shopping and Other Direct-Marketing Dominated Stations on the Basic Tier Would Not Advance the Supposed Goals of Must-Carry and Would Be Unconstitutional.

The "basic tier" of a cable system is made up of those services that a subscriber receives for the minimum cost of signing up for cable. The must-carry provisions proposed in H.R. 4850 would require cable systems in general to devote one-third of their channel capacity to carriage of local commercial television stations on the basic tier. Although certain aspects of these provisions may be constitutionally valid, others would violate the First Amendment.

For example, the provisions of H.R. 4850 guarantee the inclusion in the basic tier of qualified local affiliates of commercial broadcast networks and of local independent commercial television stations. These provisions might be found to be constitutional, since they appear to be generally consistent with the supposed purposes of must-carry to foster local broadcasting and diversity and competition in programming.

However, to the extent that absent the Ritter Amendment H.R. 4850 would guarantee basic-tier carriage of local broadcast stations used virtually exclusively (as much as 90% of the day) by a single home-shopping company, or devoted to a direct-marketing format such as "infomercials" (one-half or hour-long marketing endeavors), the bill would be unconstitutional. Stations devoted to such programming are not truly fostering localism; nor do they increase program diversity or enhance competition

among program suppliers. Therefore, mandated cable carriage of home-shopping or direct-marketing dominated stations would do nothing to further the apparent governmental interests underlying must-carry.

Indeed, to the extent that H.R. 4850 without the Ritter Amendment would require cable systems to carry national home-shopping or other direct-marketing dominated stations on the basic tier, the bill would serve no purpose other than to give these stations favored treatment against their non-broadcast competitors. This preferential effect would not be consistent with an attempt to foster local broadcasting or program diversity and would in fact be inconsistent with the goal of promoting competition in the marketplace. In our judgment, the bill would

HSN vis-a-vis other home-shopping companies such as QVC Network, Inc. that have confined their programming to cable.

In addition, others may try to convert stations into conduits for home-shopping and other direct-marketing formats such as one-half and full-hour "infomercials" in order to qualify for must-carry status under H.R. 4850. Again, encouraging such conversion of stations to home-shopping or direct-marketing domination would not serve the goals that must-carry is designed to fulfill and would have the result of favoring one competitor over another based only on its use of broadcast facilities.

The fact is that <u>there is no reason why home-shopping company or other direct-marketing dominated stations should receive must-carry status of any kind</u>:

-- Home-shopping and direct-marketing dominated stations by their very nature do not enhance the local system of broadcasting, because they are used almost exclusively for the remote broadcasting of nationally-transmitted sales presentations.

-- Home-shopping and direct-marketing dominated stations by practice do not enhance program diversity

As a result, a bill that included must-carry status for home-shopping or other direct-marketing programs merely because they were carried on broadcast stations would be the type of must-carry regulation that has been invalidated in the past as "'grossly' over-inclusive [because] the rules indiscriminately protect each and every broadcaster"[11] without regard to whether the supposed purposes of must-carry are furthered.

3. Rather Than Raising New Constitutional Issues, the Ritter Amendment Ameliorates Some of the Concerns Created by the General Must-Carry Provisions of H.R. 4850.

In proposing his amendment to H.R. 4850, Representative Ritter specifically recognized the significant First Amendment questions raised by legislation that would force some cable systems to carry home-shopping stations on their basic tier despite the primarily non-local and duplicative nature of the programming offered by those stations. Representative Ritter further noted that mandating cable carriage of home-shopping stations would confer an unfair advantage on one home-shopping company utilizing both broadcast and cable distribution systems over competing programmers and other special-interest cable networks, since many of these other networks would inevitably be forced off many cable systems due to inadequate channel capacity.

Representative Ritter proposed to avoid these unfortunate and legally suspect effects of H.R. 4850 with an amendment removing from must-carry status any commercial television station

"predominantly utilized for the transmission of sales presentations or program-length commercials." As the House Subcommittee recognized in adopting the Ritter Amendment on April 8, 1992, by making H.R. 4850 more congruent with its supposed goals of increasing localism and program diversity and competition, the amendment increases the likelihood that the legislation will pass constitutional muster. Thus, the amendment is a positive development from a First Amendment point of view.

It comes as no surprise that the only home-shopping company that currently uses both UHF stations and cable feeds to distribute its programming is unhappy at the prospect of losing its preferential position under H.R. 4850 and therefore seeks to defeat the Ritter Amendment. In an attempt to preserve the unfair advantage that it would receive under H.R. 4850 as originally drafted, this company has launched a baseless attack on the amendment on First Amendment grounds and as a denial of equal protection.

The arguments advanced against the amendment turn the constitution on its head. As we have already shown, without the amendment H.R. 4850 itself would be highly unlikely to survive a challenge under the First Amendment, because it would extend must-carry protection to stations that do not promote the goals of must-carry and because it would grant one home-shopping

is created by the general must-carry provisions of H.R. 4850 and not by the amendment. H.R. 4850 requires cable operators to carry the signals of qualified local commercial television stations. In contrast, the amendment merely excepts certain types of stations from this requirement and permits cable operators to carry or not to carry the signals of those stations as they wish. Moreover, the exception of these stations from the general must-carry requirements is based on the fact that the programming offered by these stations does not forward the purported goals of must-carry. For all these reasons, the amendment furthers constitutional goals and clearly does not create any new constitutional concerns.

One home-shopping company has complained that the amendment is designed to discriminate against its stations alone based only on the content of their speech. While Representative Ritter and the House Subcommittee identified combined use of UHF and cable affiliates by one home-shopping company as a reason for the amendment to H.R. 4850, they did not confine their concerns to that company's activities. Rather, Representative Ritter and the Subcommittee also noted that other "infomercial" (program-length commercial) producers are now trying to recruit other UHF stations to similarly convert their programming schedules into strings of virtually non-stop commercials.

The Ritter Amendment is broadly drafted to cover any home-shopping or direct-marketing dominated station that seeks to use must-carry to avoid competition and guarantee cable carriage

of its non-local broadcasts. Moreover, the amendment does not restrict or forbid carriage of such stations by cable operators; instead, it merely excludes those stations from the general must-carry provisions of H.R. 4850. For both these reasons the amendment is quite different from the statute involved in the News America case, which by design restricted the speech of a single company.[12]

The fact that the Ritter Amendment excepts certain stations from the general must-carry provisions of H.R. 4850 based on the nature of the programming of those stations does not create a constitutional problem, because it is the nature of those stations' programming that does not warrant their being given must-carry status in the first place. Under these circumstances, the Mosley case, which prohibits governmental distinctions between speakers based on the content of their speech,[13] is inapposite. In any event, unlike the situation in Mosley, where by ordinance only labor picketing was permitted near a public school, under the amendment cable operators would "still [be] free to choose" to carry a home-shopping or direct-marketing dominated station over a competing home-shopping, direct-marketing, or other cable network.[14] The amendment thus does no more than refuse to extend the automatic protection of must-carry beyond what is needed to achieve its stated goals.

The amendment proposed by Representative Ritter and adopted by the House Subcommittee is a modest, narrowly-drawn effort to remedy one of the First Amendment concerns clearly

presented by the general must-carry provisions of H.R 4850. As such, it should be endorsed by Congress and not itself subjected to baseless constitutional attacks.

FOOTNOTES

1. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

2. Quincy, supra, 768 F.2d at 1450-51, quoting United States v. O'Brien, 391 U.S. 367, 377 (1968).

3. Quincy, supra, 768 F.2d at 1454 and 1457, quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

4. Quincy, supra, 768 F.2d at 1459.

5. Id. at 1459-62.

6. Id. at 1460.

7. Id. at 1461.

8. Id. at 1462.

9. Century, supra, 835 F.2d at 300-04.

10. See H.R. Rep. No. 682, 101st Cong., 2d Sess. 62 (1990).

11. Quincy, supra, 768 F.2d at 1460.

12. See News America Publishing, Inc. v. FCC, 844 F.2d 800, 814-15 (D.C. Cir. 1988).

13. See Police Department v. Mosley, 408 U.S. 92, 96 (1972).

14. See National Association of Independent Television Producers & Distributors v. FCC, 516 F.2d 526, 537 (2d Cir. 1975).

Must-carry rules have twice been declared unconstitutional. If H.R. 4850 becomes law, must-carry will be challenged again. Again it will be claimed that government is wrongly substituting its

Statement of

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Professor of Law
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Regarding

The Ritter Amendment
to H.R. 4850

To the

Committee on Energy and Commerce
United States House of Representatives

June 5, 1992

I appreciate the opportunity to submit this statement to the Committee regarding the Ritter Amendment to H.R. 4850, the Cable Television Consumer Protection and Competition Act of 1992.

My name is Steven Shiffrin. I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I have written extensively on the First Amendment. I am the principal co-author of The First Amendment: Cases-Comments-Questions (West Publishing Co. 1991)(with Dean Choper of Berkeley), the most extensively used casebook in the field. I also co-author a set of casebooks that together with their yearly supplements are widely used in American law schools. For example, I am the co-author responsible for freedom of speech in Constitutional Law: Case-Comments-Questions (West Publishing Co. 7th ed. 1991)(with William Lockhart, Yale Kamisar, and Jesse Choper).

I write with regard to the constitutionality of Representative Ritter's amendment. Subject to exceptions not important here, the must-carry provisions of H.R. 4850 would effectively force cable system operators to allocate a certain percentage of their channels to retransmit qualified local broadcast signals (the "must-carry" rules). A major purpose of H.R. 4850 is to assure that cable system operators not exclude local sources of news and diverse programming. If passed, the must-carry rules would be premised in large part on the view that the "public's right to receive a diversity of voices is served by ensuring public access to free local broadcast television